

ST 03-4

Tax Type: Sales & Income Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**“JAMES CITRONELLA” *et al.*, as
Responsible Officers of “Jumanji Ventures,
Inc.”, d/b/a “Mugwumps”**
Respondents

**No. 00-ST-0000
FEIN No. 00-0000000
NOD # 0001; 0002; 0003
IBT # 0000-0000
NPL # 0004; 0005; 0006**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Nicholas A. Riewer appearing on behalf of “Patrick M. Williams”; Mr. Peter J. Faraci appearing on behalf of Mr. “James Citronella”; Mr. “Johann Sebastian” appearing *pro se*; Mr. Sean Cullinan and Mr. Rick Walton, Special Assistant Attorneys General, appearing on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

This matter comes on for hearing pursuant to the joint protest of “Patrick M. Williams” (hereinafter “Williams”), “James Citronella” (hereinafter “Citronella”) and “Johann Scallopini” (hereinafter “Scallopini”) to individual penalties issued against them under the provisions of the Uniform Penalty and Interest Act, as responsible parties of “Jumanji Ventures, Inc.” (hereinafter “JVI”), d/b/a “Mugwump’s Restaurant” (hereinafter “Mugwump’s”) . The Notices of Penalty Liability (“NPL’s”) represent a

liability for Retailers' Occupation Tax of "JVI" due to the Department for various months beginning July, 1997, through December, 1999. The "Notices of Deficiency ("NOD's") represent a penalty liability for withholding taxes for the fourth quarter of 1998 and the first two quarters of 1999. A hearing was held on this matter on December 12, 13 and 17, 2002 with "Williams", "Citronella", and "Scallopini", *inter alia*, providing oral testimony. Following the submission of all evidence and a review of the record, it is recommended that all NPL's and NOD's be finalized as issued. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the NPL's, dated July 27, 2000, showing a personal penalty liability based upon the tax liability of "JVI" of \$99,306.85 for various months beginning July, 1997, through December, 1999, and the NOD's, dated July 28, 2000, showing a personal penalty liability due and owing for unpaid withholding tax of \$13,953.03 for the fourth quarter of 1998 and the first two quarters of 1999. Tr. pp. 44-51; Dept. Ex. Nos. 1,2,3,4,5, 6.

2. "Williams" has a degree in accounting. Prior to working at "Mugwump's", he worked for an accounting firm doing research and reconciling of accounts. He started at "Mugwump's" in September, 1995, as a part-time bartender reporting to "Citronella" and "Scallopini". Eventually, "Williams's" responsibilities included counting the time that the food service employees, bartenders and kitchen employees clocked in and out and reporting this information to "Scallopini". In September, 1996, "Williams" became

a part-time food server at “Mugwump’s” while continuing his bartending duties and time card duties. Tr. pp. 84-92, 121-122, 133, 179-180.

3. In mid-1997, “Williams” became a full-time day manager at “Mugwump’s”. He prepared the payroll, added up the timecards, reported the hours to the payroll service, counted the money that came in the night before and made sure it matched the sales records. He assisted with hiring bartenders, servers and host. “Williams” filled out “ST-1’s,” sales tax withholding forms. “Williams” reported at first to “Anthony Michael Hall”, general manager and when “Hall” left in May of 1999, to “Christopher Guest”. Tr. pp. 92-103, 122-123, 133.

4. The IL-941’s, “Employer’s Quarterly Illinois Withholding Tax Returns,” for the first and second quarters of 1999, included in the NOD’s, were signed by “Williams”. “JVI” check numbers 5731 and 6047 payable to the Illinois Department of Revenue, dated April 30, 1999 and August 2, 1999, for first and second quarter withholding tax of \$454.11 and \$838.16, respectively, were signed by “Williams”. The IL-941 for the fourth quarter of 1998 contains the signature of “Patrick M.Williams” as “Mgr.” “Williams” testified that he did not sign this IL-941. Tr. pp. 51-53, 70-72, 100; Dept. Ex. Nos. 7, 42.

5. LaSalle Bank, N.A. “Signature Required for Withdrawal” for account three accounts list “Patrick Williams,” *inter alia*, as an authorized signature. All signature forms are signed by “Williams”. On March 9, 1999, La Salle Bank sent a letter to “JVI” verifying authorized signatures for the three accounts. This letter listed “Williams” as an authorized signature on each account. Tr. pp. 77, 78, 126-127, 140-141, 288-289; Dept. Ex. Nos. 31, 32, 33, 34, 35, 36.

6. On October 13, 14, 15, and 19, 1998, “Williams”, as “Manager, Jumanji Ventures, Inc.” signed letters to LaSalle National Bank transferring \$2,000, \$3,000, \$1,500, \$6,000, respectively, from account no. (X), a credit card account, to account no. (Y), an operating account. Tr. pp. 78, 102-103, 140-141; Dept. Ex. No. 37.

7. “Mugwump’s, Inc.” check nos. 6295 and 6299, dated December 7, 1999, for \$2,581 and \$377.44, drawn on account number (Y) at The Northern Trust Company were signed by “Williams”. Tr. p. 79; Dept. Ex. No. 38.

8. “Williams” signed the following 21 checks payable to the Illinois Department of Revenue: No. 2701 for \$11,334 dated November 20, 1998; No. 2702 for \$7,720 dated November 20, 1998; No. 2705 for \$9,826 dated December 21, 1998; No. 2707 for \$7,720 dated December 21, 1998; No. 2708 for \$16,651 dated January 20, 1999; No. 2709 for \$1,903 dated January 20, 1999; No. 2710 for \$7,720 dated January 20, 1999; No. 2711 for \$938 dated February 22, 1999; No. 2712 for \$8,208 dated February 22, 1999; No. 2713 for \$7,720 dated February 22, 1999; No. 2714 for \$15,279 dated March 22, 1999; No. 2715 for \$1,746 dated March 22, 1999; No. 2716 for \$7,720 dated March 22, 1999; No. 2717 for \$13,976 dated April 20, 1999; No. 2718 for \$1,598 dated April 20, 1999; No. illegible for \$7,720 dated April 20, 1999; No. 2721 for \$12,491 dated May 20, 1999; No. 2722 for \$1,428 dated May 20, 1999; No. 2724 for \$1,023 dated June 21, 1999; No. 2725 for \$8,951 dated June 21, 1999; No. 2726 for \$7,720 dated June 21, 1999. Each of these checks was returned from the bank marked “NSF.” Tr. pp. 79-81, 124-126, 132; Dept. Ex. Nos. 39, 40.

9. “Williams” wrote checks to bookkeeping services. Tr. p. 116.

10. “Williams” had access to cancelled checks returned from the bank. Tr. pp. 116-118.

11. “Midwest Strategies, Inc., is an employee leasing company that provided employees to “Mugwump’s”. In Circuit Court of Cook County case no. 98 L 9314, Midwest Strategies, Inc., Plaintiff, v. “Jumanji Ventures, Inc.”, Defendants, “JVI’s” “Answers To Request To Admit” are verified as “true and correct” by “Patrick M. Williams”.” Tr. pp. 68-69, 116-118, 127-129, 135-139, 141-143; Dept. Ex. No. 22.

12. “Scallopini” initially invested \$75,000 in “JVI” and later borrowed \$124,000 from his father and \$20,000 from a former employer, to invest in the business. Tr. pp. 239-240.

13. “Citronella” initially invested \$75,000 in “JVI”. Angelo “Citronella”, “Citronella’s” father, established a \$185,000 line of credit at Cole-Taylor Bank in September, 1995. Angelo gave \$100,000 of this amount to “Citronella”, by check payable to “Citronella”. “Citronella” paid interest on this loan, and a slight deduction in the principal. Angelo subsequently gave “Citronella” between \$22,000 and \$24,000 by check payable to “Citronella” that Angelo borrowed from Parkway Bank. Tr. pp. 161-169, 173; “Citronella” Ex. No. 8.

14. “Citronella” started “JVI” Ventures, Inc. d/b/a/ “Mugwump’s” Restaurant in 1994 with “Nick Adams” and “Scallopini”. The three were partners, with “Citronella” and “Scallopini” acting as operating partners. They supervised the kitchen and staff, ordered the food, dealt with purveyors, paid the bills, including withholding and sales tax, and hired and fired employees. Prior to July of 1997, “Citronella” went to

“Mugwump’s” every day. The restaurant was located in leased premises in Chicago. Tr. pp. 170-173, 181, 191.

15. On January 1, 1995, Nick “Adams” sold his interest to “Carmen Basilio” “Citronella’s” first cousin. “Basilio” did not assume an operating position. Tr. pp. 173-174.

16. “Mugwump’s” clientele was mainly from events at the United Center including Chicago Bulls and Black Hawk games. From 1994 through 1997, the business barely survived. At the time “Mugwump’s” was opened, the partners planned to extend the restaurant into a building east of the restaurant. Shortly after opening, the partners solicited investors for the expansion, including “Christopher Guest”, a frequent patron of the restaurant. Tr. pp. 174-177.

17. On April 8, 1997, “Citronella”, “Basilio”, “Guest”, and “Scallopini” signed and entered into a “Shareholders Agreement,” with “Guest” becoming a shareholder. The Agreement names “Scallopini” as President, “Guest” as Vice President, “Basilio” as Treasurer, and “Citronella” as Secretary. Section 13.2 of the Agreement states that as long as “Guest” is a shareholder of the company, he “shall have the right to be reasonably exercised in his sole discretion to select a person who shall act as manager of and have unrestricted access to the books and records of the Company.” “Guest” hired “Anthony Michael Hall” as manager. “Citronella”, “Scallopini” and “Basilio” were represented by attorney, Robert Weber, in this transaction. Tr. pp. 176-179, 299-307, 346-347; “Citronella” Ex. No. 2.

18. In April of 1997, “Mugwump’s” leased the property next door with an option to purchase in July of 1997. “Mugwump’s” needed \$700,000 to purchase the property. “Guest” offered to supply some of the needed capital. Tr. pp. 182-184, 307-308.

19. “Guest” advanced \$190,000 to “Mugwump’s”. “JVI Shareholders Agreement” dated July 10, 1997 states that the ownership of “JVI” shares shall be as follows: “C., Inc.” (for “Christopher Guest”) 227,000 shares (51%); “Scallopini”, 77,806 shares (18%); “Basilio”, 58,354 shares (13%); “Citronella”, 81,840 shares (18%). The Shareholders Agreement states that “Guest” shall serve as president, vice-president, treasurer, secretary and “sole director of the Company so long as the Company is indebted to Him.” The Agreement is signed by “Citronella”, “Scallopini” and “Basilio”, who were represented by attorney Robert Weber. There is no signature for “C, Inc.” by “Christopher Guest, IV.” Neither “Citronella” nor “Scallopini” ever received a copy of the document with “Guest’s” signature on it. Tr. pp. 183-187; “Citronella” Ex. No. 1.

20. Attached to the July 10, 1997, Shareholders Agreement is a “Termination of Shareholders Agreement of “Jumanji Ventures, Inc.” terminating the April 8, 1997, Shareholders Agreement. This is signed by “Scallopini”, “Basilio” and “Citronella”, but there is no signature for “Christopher Guest”, IV. The Termination Agreement is not dated. Also attached to the July 10, 1997, Shareholders Agreement are signed resignations “effective as of July 10, 1997,” of “Scallopini”, as “officer, director, and employee” of “JVI”, “Citronella” as “officer, director and employee” of “JVI” and “Basilio” as “officer and director” of “JVI”. The resignations are not dated. They were drafted and sent unsigned from Michael Abramson, “Guest’s” attorney, to Robert

Weber on July 10, 1997. Tr. pp. 183-189, 231-232, 241, 244-245, 308-318, 347; “Citronella” Ex. Nos. 1, 3, 4.

21. Between April 8, 1997, through July 9, 1997, meetings of “JVI” shareholders were held with “Citronella”, “Scallopini”, “Basilio” and “Guest” attending. Sales, accounts receivable, and accounts payable, including sales and withholding tax payments to the Department of Revenue, were discussed. Tr. pp. 347-353.

22. After July 10, 1997, meetings of “JVI” shareholders were held. Sales and bills including sales tax were discussed. In 1998, meetings of “JVI” shareholders were held. Sales, paying bills and being able to keep the business going were discussed. “Guest” would report that the bills were being paid, although some were being paid late. Between January 1, 1999, and the closing of “Mugwump’s”, meetings of “JVI” shareholders were held. Income and payables were discussed. Tr. pp. 353-355.

23. “Written Consent of the Sole Shareholder of “Jumanji Ventures, Inc.” in Lieu of Annual Meeting” was admittedly signed by “Citronella” as “sole shareholder” on April 1, 1998. Tr. pp. 72-73, 196-198; Dept. Ex. No. 24.

24. “Written Consent of the Board of Directors of “Jumanji Ventures, Inc.” in Lieu of Annual Meeting” was admittedly signed by “Citronella” as “sole director” on April 1, 1998. Tr. pp. 73-74, 196-198; Dept. Ex. No. 25.

25. On December 18, 1998, “Citronella” met with “Guest” with regard to reinstating “JVI” with the Secretary of State. “JVI’s” State of Illinois “Application for Reinstatement of Domestic or Foreign Corporation” was admittedly signed on December 18, 1998 by “Citronella” as “secretary” and “president.” Tr. pp. 66, 202-205; Dept. Ex. No. 19.

26. On February 22, 2000, “Citronella” and “Scallopini” asked the Chicago Liquor Commission to revoke “Mugwump’s” liquor license. Transcript of proceedings dated February 22, 2000 entitled “In Re: Proceedings to Revoke Retail Liquor License Issued to “Jumanji Ventures, Inc.” states that the City and the licensee “stipulate to a voluntary revocation of all City licenses.” The corporate officers were asked to state on the record that they agreed with this stipulation. “Scallopini” stated on the record that he was one of the shareholders in “JVI” and “Citronella” stated on the record that he was one of the shareholders and the president of “JVI”. Tr. pp. 76, 210-212, 221-226, 248-250; Dept. Ex. No. 29.

27. On March 15, 2000, “Scallopini”, “Citronella” and “Basilio” filed a “Verified Complaint,” Circuit Court of Cook County no. 00 CH 04211, against “Guest” for an accounting, breach of fiduciary relations, breach of contract, fraud, constructive trust and declaratory judgment. The verified complaint states that on July 10, 1997, “Guest” established a fiduciary relationship with Plaintiffs, “Basilio”, “Scallopini”, and “Citronella” in that he became their agent in managing, controlling, selling meals, food, beverages (including alcoholic beverages), to the public, with the duty of accounting for such sales and for the monies defendant “Guest” collected.” “Citronella” admits signing, reviewing, and speaking to his attorneys with regard to the Verified Complaint. Tr. pp. 282-284, 287-288; “Citronella” Ex. No. 12.

28. On July 5, 2000, “Scallopini”, “Citronella” and “Basilio” filed an “Amended Verified Complaint” against “Guest” which states that in the course of negotiating the terms of the July 10, 1997 Shareholders Agreement, “Guest” “told plaintiffs that in order to protect his investment in “Mugwump’s Restaurant”, it was necessary that he

manage, run, and control the business of “Mugwump’s Restaurant.” “Citronella” admits signing the verification “that the matters set forth are true in substance and in fact.” “Citronella” denies that he read the Amended Verified Complaint before signing. Tr. pp. 69-70, 212-213, 226-228; Dept. Ex. No. 23.

29. Illinois Department of Revenue “Board of Appeals Petition,” for “JVI”, was admittedly signed by “Citronella”. The Petition is dated October 4, 1999. “Citronella” denies dating it and testified that he only saw the signature page of the document, but never saw the other six pages. The Petition lists “all corporate shareholders” as “James Citronella” and “Johann Scallopini”. Tr. pp. 57-59, 216-217, 229-231; Dept. Ex. No. 10.

30. An “Application for State of Illinois Liquor License” issued October 5, 1999 was admittedly signed by “Citronella”. “Citronella” denies listing his “title/position” as “president” and denies dating the document “October 4, 1999.” Tr. pp. 217-218; Dept. Ex. No. 15.

31. The “Application for City of Chicago Business License and Tax Registration” lists both “Citronella” and “Scallopini” as 50% stockholders in “JVI” and is admittedly signed by “Citronella”. “Citronella” denied listing his “title” as “Secretary” and denies dating the application August 14, 1998. Tr. pp. 74-75, 218; Dept Ex. No. 26.

32. The State of Illinois’ “Domestic Corporation Annual Report” for 1999 lists “Citronella” as president, secretary, treasurer and director and contains “Citronella’s” signature dated May 8, 1999. The 1998 Report lists “Citronella” as president, secretary and director and was admittedly signed by “Citronella” on December 18, 1998. The 1997 Report lists “Scallopini” as president and director, “Citronella” as secretary and

director, and was admittedly signed by “Scallopini” on June 25, 1997. The 1996 Report lists “Citronella” as president/secretary and director and contains “Citronella’s” signature on June 25, 1997. Tr. pp. 59-62, 202-205, 241-242; Dept. Ex. Nos. 11, 12, 13, 14.

33. “JVI’s” “Renewal Application for State of Illinois Liquor License” dated October 1, 1996 is signed by “Scallopini” as “President/Secretary.” “JVI’s” Renewal Application dated March 4, 1998 is signed by “Scallopini” as “President.” “JVI’s” Renewal Application dated August 14, 1998 is signed by “Citronella” as “Owner.” “JVI’s” Renewal Application dated October 4, 1999 is signed by “Citronella” as “President.” The “Corporate Officer/Ownership information of Record” on all four renewals lists “Citronella” as President and “Scallopini” as owner. Tr. pp. 62-66, 200-202, 242; Dept. Ex. Nos. 15, 16, 17, 18.

34. The Complaint in Circuit Court of Cook County case no. 98 CH 015697, “Jumanji Ventures, Inc.”, Plaintiffs, v. “Nicholas Adams”, Defendant, filed November 12, 1998, is verified as “true” and the verification admittedly signed by “John “Scallopini”, on behalf of “Jumanji Ventures, Inc.” “Scallopini” testified that he never saw the complaint although he knew what it was about. Tr. pp. 67-68, 243, 247-248; Dept. Ex. No. 21.

35. City of Chicago liquor “License Certificates” for “JVI” dated November 17, 1998 and December 30, 1999 both list “Citronella” as president and secretary. Tr. p. 26; Dept. Ex. Nos. 27, 28.

Conclusions of Law:

There are two types of taxes at issue here. The Department seeks to impose personal liability on “Williams”, “Citronella” and “Scallopini” pursuant to Section 1002(d) of the Illinois Income Tax Act for the failure to pay withholding taxes. 35 ILCS 5/1002(d). In addition, the Department seeks to impose personal liability on “Williams”, “Citronella” and “Scallopini” for failure to remit Retailers’ Occupation Tax (“ROT”).

The personal liability penalty for both taxes is imposed by Section 3-7 of the Uniform Penalty and Interest Act, which provides as follows:

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who willfully fails to file the return or to make the payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. The Department shall determine a penalty due under this Section according to its best judgment and information, and that determination shall be *prima facie* correct and shall be *prima facie* evidence of a penalty due under this Section.
35 ILCS 735/3-7.

It is clear under the statute that personal liability will be imposed only upon an officer or employee who: (1) is responsible for filing corporate tax returns and/or making the tax payments; and (2) “willfully” fails to file returns or make payments.

The admission into evidence of the NOD’s and NPL’s establishes the Department’s *prima facie* case with regard to both the fact that “Williams”, “Scallopini” and “Citronella” were “responsible” and the fact that they “willfully” failed to file

and/or pay. Branson v. Department of Revenue, 168 Ill. 2d 247, 262 (1995). Once the Department has established a *prima facie* case, the burden shifts to the taxpayers to rebut the *prima facie* correctness of the assessments. Masini v. Department of Revenue, 60 Ill.App.3d 11 (1st Dist. 1978).

I conclude, based on the evidence and testimony admitted at the evidentiary hearing, that “Williams”, “Citronella” and “Scallopini” were responsible parties under the statute. In determining whether an individual is a responsible party, the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursement of funds. Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. *Id.*

“Williams” has a degree in accounting and worked for an accounting firm before starting as a bartender at “Mugwump’s” in September, 1995. Tr. p. 85. Beginning in mid-1997 and continuing through the time period at issue in this case, “Williams” became a full time employee of “JVI” and floor manager at “Mugwump’s”. Tr. p. 92. “Williams” prepared the payroll, added up the timecards, reported the hours to a payroll service, and reconciled the sales records to the money taken in. Tr. p. 133. He assisted with hiring bartenders, servers and hosts. Tr. p. 92. “Williams” filled out the sales tax withholding forms and signed the IL-941’s, “ Employer’s Quarterly Illinois Withholding Tax Returns” for the first and second quarters of 1999. Dept. Ex. No. 7. “Williams” was apparently not a shareholder or officer of the corporation, as pointed

out several times by his attorney during the evidentiary hearing. Tr. p. 86. According to the statute, however, it is not necessary that one be an officer or shareholder of the corporation for personal liability to be imposed. 35 ILCS 735/3-3. If, as an employee, the individual has the control, supervision or responsibility of filing returns and making payment of the tax, and willfully fails to file such return or make such payment, he will be subject to personal liability. “Williams’s” preparation of the sales tax withholding forms, his signature on the “IL-941’s” filed with the Department and his signature on the checks as detailed below clearly show that she was responsible for filing and paying the taxes at issue.

“Williams” had the ability to write corporate checks. He was a signatory on three bank accounts at LaSalle Bank, N.A. The signatory cards for these accounts indicate that “any 1 signature(s) required for withdrawal.” Dept. Ex. Nos. 31, 32 and 33. “Williams” was able to transfer money between accounts, and on at least four occasions, he transferred money between accounts at LaSalle Bank. No second signature was required for these transfers. Dept. Ex. No. 37. “Williams” signed checks drawn on a “Mugwump’s, Inc.” bank account at Northern Trust Bank. Dept. Ex. No. 38. “Williams” signed 21 checks to the Illinois Department of Revenue, each returned by the bank marked “NSF.” Dept. Ex. Nos. 39 and 40.

The fact that “Williams” had the authority to sign checks and transfer funds without the signature of another party is an indication of his control over and responsibility for “JVI’s” assets. He testified repeatedly that she signed checks only when instructed to do so. His attorney asked her “[Y]ou were not authorized, I take it, to send the checks out without authorization from your superiors?” “Williams’s”

response: “No.” Tr. p. 98. Similarly, “Williams” was asked about his signature on the letters transferring funds between accounts:

My supervisor would tell me to make these documents up and send them to the bank because I was a signer on the account. I had to type it up, and “Christopher Guest” would tell me what to transfer from my account to the other account, and they needed to have a signature and I was a signature on the bank account.
Tr. p. 103.

The ability to sign corporate checks is a significant factor in determining whether a person is a responsible party because it generally comes with the ability to choose which creditors are paid. Gold v. United States, 506 F. Supp. 473 (E.D.N.Y. 1981), aff’d, 671 F. 2d 492 (2d Cir. 1982). Each time “Williams” signed, he participated in “decisions regarding the payment of creditors and disbursement of funds,” evidencing his status as a responsible party in “JVI”. Monday, *supra*.

Since only one signature was required on checks and fund transfers, “Williams” unilaterally could have written a check to cover the Illinois taxes. Since only one signature was required to transfer funds between accounts, “Williams” unilaterally could have transferred money to an account to cover the Illinois taxes. No evidence was offered at the hearing showing that “Williams” ever refused to sign a check during the course of signing the twenty-one checks payable to the Department of Revenue, all of which were returned from the bank marked “NSF.” “Williams” testified repeatedly that “Christopher Guest” and other parties instructed him to draw up checks. Tr. pp. 93, 95. The fact is that “Christopher Guest”, *inter alia*, were also approved signatories on the LaSalle Bank accounts. Dept. Ex. Nos. 31, 32, 35 and 36. I must question why, if “Williams’s” supervisors were instructing him to draft checks as he testified, he didn’t draft the checks and ask his supervisors to sign them.

In addition, “Williams” had access to the corporate bank statements. I must also question why “Williams” continued to sign checks to the Department when prior ones were being returned as “NSF.” With his background, he had to know whether there were sufficient funds to cover the checks he was signing. Certainly, with this knowledge, it is reasonable to conclude that his failure to ask any of the other signatories to sign these “NSF” checks reflects his full participation in the corporation’s failure to remit the mandated tax monies.

“Williams’s” self-serving testimony regarding his lack of responsibility in the corporation is contradicted by the documentary evidence. In December, 1999, “JVI” was served with a “Request To Admit” in Midwest Strategies, Inc. v. “Jumanji Ventures, Inc., d/b/a “Mugwump’s”. The answers to the Request To Admit are verified as “true and correct” by “Patrick Williams” “under penalties as provided by law.” Dept. Ex. No. 22. It is reasonable to conclude that a corporation would only ask a responsible employee to verify a legal document. Once again, “Williams” assumes no responsibility for the answers. He testified on direct examination that he was asked to verify the answers by one of her supervisors, either “Christopher Guest” or “Anthony Michael Hall”. Tr. pp. 118-119. He verified the information by looking at some of the checks referenced in the Request To Admit, because he had access to various checks and books. However, she was not verifying the Request To Admit as an officer, director or shareholder of the corporation. Tr. p. 118.

Question 10 of the Request To Admit states as follows: “At the time the [attached] document was executed by “Christopher Guest”, he was an officer of “Jumanji Ventures, Inc.”, an Illinois Corporation d/b/a “Mugwump’s” located in

Chicago, Illinois.” The response to this question was “Deny” and this response was verified as “true and correct” by “Williams” “under penalties.” Dept. Ex. No. 22. At hearing, on direct examination, “Williams” was asked what his “understanding” was as to “Christopher Guest’s” position with “Jumanji Ventures” or “Mugwump’s” restaurant.” “Williams” responded “I don’t know.” Tr. pp. 92-93. On cross-examination, the Department asked:

- Q. If you didn’t know whether [Guest] was an officer or an owner, how are you able to deny that particular request for admission regarding the status as an officer?
- A. I wasn’t even familiar with this; and when they asked me to look at this, I might not have understood the question.
- Q. Who asked you to look at this?
- A. I don’t remember.
- Tr. p. 137.

This testimony is similar to “Williams’s” previous testimony that, although a full time manager at “Mugwump’s”, he performed every activity based on someone’s instruction. According to his testimony at the hearing, he even verified the answers to the Request To Admit “under penalties” at someone else’s instruction, although on cross-examination, he no longer remembered who had instructed her to do this. When “Williams” was questioned by “Citronella’s” counsel, he was asked if he ever recalled “looking at the [Request To Admit] to verify the authenticity of the questions that were given and the answers that were given?” He responded: “Not in full.” Tr. p. 143. He testified that he did not have “an opportunity to review the document for its authenticity.” Tr. p. 144. He was asked if “it would be fair to say that the documents that [he] signed on behalf of “JVI”, were always at the direction of “Christopher Guest” or one of [her] other supervisors?” He responded “[Y]es.” Tr. p. 144.

“Williams’s” testimony is simply not credible. I cannot reasonably conclude that “Williams” signed numerous checks at “Guest’s” instruction, as he testified, if he truly believed that he was not an officer of the corporation as stated in the answers to the Request To Admit. “Williams” has a degree in accounting and had worked in an accounting firm. His background, her signature on the answers to the Request to Admit and his knowledge of the status of officers in the corporation indicate that he had considerably more responsibility in “JVI” than that of a bookkeeper or payroll clerk. “Williams” was “JVI’s” full time manager. He signed numerous checks and fund transfers without the necessity of ever attaining a second signature, indicating his control over and responsibility for “JVI’s” assets. He signed withholding tax returns and prepared sales tax returns. He admits that she had access to “JVI’s” checks and books. Tr. p. 118. The totality of these activities compel me to conclude that he had more than a clerical or administrative role, and that he was, in fact, an employee of “JVI”, who had control and supervision for the filing of tax returns with the Department and the payment of taxes.

I have concluded further, based on the evidence and testimony presented at the hearing, that “Citronella” and “Scallopini” were also responsible officers of “JVI”. The State of Illinois “Domestic Corporation Annual Report” for year 1996, lists “Citronella” as “president/secretary” and “director” and was signed by “Citronella” on June 25, 1997. Dept. Ex. No. 14. The Annual Report for 1997 lists “Scallopini” as “president” and “director” and “Citronella” as “secretary “ and “director” and was signed by “Scallopini” on June 25, 1997. Dept. Ex. No. 13. “JVI’s” “Renewal Application for State of Illinois Liquor License” dated October 1, 1996 lists “Scallopini” as “pres/sec”

and was signed by him on October 1, 1996. Dept. Ex. No. 17. The April 8, 1997, “Shareholder Agreement” names “Scallopini” as “president” and “Citronella” as “secretary.” Both “Citronella” and “Scallopini” held the position of “president” prior to July 10, 1997. The president of a corporation is usually charged with the overall responsibility for the management of the corporation, and without any evidence to the contrary, there is no reason to assume that this was not the case with “JVI”. “Citronella” stated that when “Mugwump’s” first opened, he and “Scallopini” “had the same responsibilities.” “Citronella’s” counsel asked him if he was “responsible for the paying of the withholding taxes and the sales taxes for “Mugwump’s”” during that time period. “Citronella” responded “[A]bsolutely.” Tr. p. 172.

“Citronella’s” and “Scallopini’s” argument, and the crux of their case, is that their responsibilities ended with the July 10, 1997 Shareholders Agreement. Under the terms of this Agreement, “Christopher Guest” was to become president, vice-president, treasurer, secretary, 51% shareholder, and “sole director of the Company so long as the Company is indebted to him.” “Citronella” Ex. No. 1. The problem with the July 10, 1997 Shareholders Agreement is that there is absolutely no evidence that the Agreement was ever signed by or agreed to by “Guest”. No copy of a July 10, 1997 Shareholders Agreement signed by “Guest” was admitted into evidence. “Citronella” testified that he did not retain a copy that was signed by “Guest”. Tr. p. 187. “Scallopini” never received a copy of the July 10, 1997 Shareholders Agreement signed by “Guest”. On cross-examination, “Scallopini” was asked: “So, it’s your understanding that Clarence “Guest” never signed this agreement; is that correct?” He responded: “That’s what I have been told when we tried finding it.” Tr. pp. 244-245. Robert Weber, who was

“Citronella’s and “Scallopini’s counsel for the July 10, 1997 Shareholders Agreement, does not “recall” seeing “any stocks that were issued by the corporation that would reflect this [Shareholders] Agreement.” Tr. pp. 326-327. Weber does not “recall” seeing “any board minutes reflecting anything that might have been mentioned in the agreement.” Tr. p. 327. Weber does not have a “clear recollection” of whether he saw a copy of the July 10, 1997 Shareholders Agreement signed by “Guest”. “I have a vague recollection of seeing a copy, but I don’t recall seeing an original.” Tr. p. 327.

Attached to the July 10, 1997 Shareholders Agreement is a “Termination of Shareholders Agreement of “Jumanj Ventures, Inc,” (“Termination Agreement”) signed by “Scallopini”, “Basilio” and “Citronella” with a space, but no signature, for “Christopher Guest, IV.” The Termination Agreement terminated the Shareholders Agreement of April 8, 1997, as of July 1, 1997. “Citronella” Ex. No. 1. No copy of the Termination Agreement signed by “Guest” was admitted into evidence. In Illinois, “it is true that if a written contract by its terms is drafted as a mutual agreement among several parties, it must be signed by all parties in order to bind them, or it will not bind any party because the contract will remain uncompleted.” Crum v. Krol, 99 Ill. App. 3d 651 (1st Dist. 1981). Because there is no evidence that the July 10, 1997 Shareholders Agreement or the Termination Agreement was ever signed by “Guest”, I must consider both Agreements “uncompleted” and unexecuted with no legal effect for purpose of these tax penalties. The only executed agreement having all four required signatures on it, is the April 8, 1997 Shareholders Agreement, listing “Scallopini” as president, and “Citronella” as secretary. I conclude that “Scallopini” and “Citronella” continued to

hold the offices of president and secretary, respectively, after April 8, 1997 and throughout the accrual of the unpaid sales and withholding taxes.

Also attached to the uncompleted July 10, 1997, Shareholders Agreement are signed resignations as of July 10, 1997, of “Scallopini” as “officer, director and employee of “JVI”” and “Citronella” as “officer, director and employee of “JVI”.” “Citronella” Ex. No. 1. The resignations are not referred to in the July 10, 1997 Shareholders Agreement and I am unable to determine if the resignations were contingent on the execution of that Shareholders Agreement. The unsigned resignations were sent from “Guest’s” attorney, Michael Abramson, to Robert Weber on July 10, 1997. “Citronella” Ex. No. 4. The letter from Abramson states that “[U]pon execution of the enclosed documents, [“Guest”] will assume responsibility for all day to day operations of the business and any employment relationships of John “Scallopini”, John “Citronella”...will be terminated without claim for additional compensation.” “Citronella” Ex. No. 4.

A letter dated July 16, 1997 from Robert Weber to “Citronella” and “Scallopini” states that “[E]nclosed are copies of the papers you signed on July 15.” In this letter, the last paragraph states that, “[I] am continuing to hold the papers which you have signed. I told Mr. Abramson that I agreed to do that until you were satisfied.” Tr. pp. 322-324; “Citronella” Ex. No. 3. Mr. Weber testified that the resignations were “definitely signed between July 10, 1997 and July 15, 1997.” Tr. p. 318. Assuming that the resignations were signed by July 15, 1997, I am unable to determine from Weber’s letter when, if ever, the resignations were transmitted to Abramson or “Guest”. “Citronella” testified that he did not think it was his responsibility to “actually go to the Secretary of State

and submit [his] resignation.” He assumed that the attorney that he retained would “close up the ends [by] recording this.” Tr. p. 190. No evidence was presented that the resignations were ever recorded by the Secretary of State. An affidavit of Patricia Woulfe, Staff Attorney for the Mayor’s License Commission of the City of Chicago, Local License Control Commission, states that “[S]ince “Jumanji Ventures” applied for its initial liquor license in 1994, no group, individual, or entity has applied for a change of officers or shareholders or otherwise notified the City of any change in the direct or beneficial ownership of the licensee corporation or the premises.” Tr. p. 30; Dept. Ex. No. 30.

In summary, the April 8, 1997 Shareholders Agreement, which is the only agreement admitted into evidence that was executed by all four parties, names “Scallopini” as “president,” and “Citronella” as “secretary.” “Scallopini” and “Citronella” argue that their responsible officer status effectively ended with 1) either the July 10, 1997 Shareholders Agreement, not signed by “Christopher Guest” and not evidenced by the issuance of new share certificates, or 2) the Termination Agreement, not signed by “Christopher Guest”, or 3) the undated resignations, which were not reflected in any corporate board minutes, not recorded with the Secretary of State or the City of Chicago Local License Commission. “Citronella’s” and “Scallopini’s” arguments exceed the bounds of credibility.

“Citronella” testified that after he signed his resignation, he “absolutely” acted in accordance with the July 10, 1997, Shareholders Agreement. “From that moment on,... I no longer had any more control or acted as having any more control of that restaurant.” Tr. pp. 187-188. Similarly, “Scallopini” testified that it was his

“understanding” and “expectation” that after July 10, 1997, his “duties with respect to running the day-to-day operations of “Mugwump’s Restaurant” were over.” Tr. p. 242. He was asked “[Y]ou never assumed any additional duties after that day, correct?” “Scallopini” responded “Never.” Tr. p. 242.

However, the evidence overwhelmingly indicates otherwise and shows conclusively that “Citronella” and “Scallopini” never relinquished their positions of responsibility in “JVI” after their alleged July 10, 1997 “resignations.” On March 4, 1998, approximately seven months after his “resignation,” “Scallopini” admittedly signed “JVI’s” “Renewal Application for State of Illinois Liquor License.” Dept. Ex. No. 18. “Scallopini” denies listing his “title/position” on the Application as “pres.” Tr. p. 242. The second page of the Renewal Application lists “Citronella” as “President” and “Scallopini” as “Owner,” although, according to “Scallopini”, the ownership was “not even the right percentage.” Tr. p. 242. “Scallopini” signed the Renewal Application because “there were no other owners available and Mr. “Guest” was out of town. [“Anthony Michael Hall”] needed to get this license renewed.” Tr. p. 242. Circuit Court of Cook County case “Jumanji Ventures, Inc.”, Plaintiffs, v. “Nicholas Adams”, Defendant, filed November 12, 1998, sixteen months after “Scallopini’s” “resignation,” is verified as “true” and the verification admittedly signed by “John “Scallopini”, on behalf of “Jumanji Ventures, Inc.” While admitting to signing the verification, “Scallopini” testified that he never saw the complaint although he knew “basically what it was supposed to be about.” Tr. pp. 247-248; Dept. Ex. No. 21. When asked if, in verifying this complaint, he was performing a function for “Jumanji Ventures, “Scallopini” replied “[W]ell I thought we were performing a function to keep

the restaurant from closing as far as my ownership goes.” Tr. p. 248. The fact is, if “Scallopini” could assume responsibility after July 10, 1997, to renew “Mugwump’s” liquor license and to verify a complaint “on behalf of “Jumanji Ventures, Inc.” in order to protect his investment, he could assume the responsibility to authorize a check to the State of Illinois for unpaid taxes.

On April 1, 1998, approximately eight months after his “resignation,” “Citronella” as “sole shareholder” admittedly signed a document entitled “Written Consent of the Sole Shareholder of “Jumanji Ventures, Inc.” in Lieu of Annual Meeting.” Tr. pp. 72-73, 196-198; Dept. Ex. No. 24. Also on April 1, 1998, “Citronella” as “sole director” admittedly signed “Written Consent of the Board of Directors of “Jumanji Ventures, Inc.” in Lieu of Annual Meeting.” Tr. pp. 73-74, 196-198; Dept. Ex. No. 25. It must be noted that “Citronella” testified that after July 10, 1997, he “absolutely” acted in accordance with the Shareholders Agreement. Tr. p. 187. That Agreement states that “Citronella” retained 18% of the shares of “JVI” so he was obviously not “sole shareholder” and that “Christopher Guest”, not “Citronella”, was “sole director” as long as “JVI” was indebted to him. It is simply not credible that “Citronella” thought that the July 10, 1997 Shareholders Agreement was operative or that he acted in accordance with it when eight months later, he admittedly signed his name as “sole shareholder” and “sole director.” The fact is, as either “sole shareholder” or “sole director,” “Citronella” could have authorized a check for unpaid Illinois taxes.

On August 14, 1998, approximately thirteen months after his “resignation,” “Citronella” as “Owner” signed “JVI’s” “Renewal Application for State of Illinois Liquor License” The Application lists “Citronella” as “President” and “Scallopini” as

“Owner.” Dept. Ex. No. 16. Also on August 14, 1998, “Citronella” admittedly signed the “Application for City of Chicago Business License and Tax Registration.” This Application lists both “Citronella” and “Scallopini” as 50% shareholders in “JVI”. Although “Citronella” admits to signing the Application, he denies listing his title as “secretary” and denies dating the Application August 14, 1998. Tr. pp. 74-75, 218; Dept. Ex. No. 26. The City of Chicago liquor “License Certificate” dated November 17, 1998 lists “Citronella” as president and secretary. Dept. Ex. No. 27.

On December 18, 1998, seventeen months after his “resignation,” “Citronella” met with “Christopher Guest” with regard to reinstating “JVI” with the Illinois Secretary of State. “JVI’s” “Application for Reinstatement of Domestic or Foreign Corporation” was admittedly signed by “Citronella” as “secretary” and “president” on December 18, 1998. Tr. pp. 202-203; Dept. Ex. No. 19. Also on December 18, 1998, “Citronella” as “president” admittedly signed the State of Illinois “Domestic Corporation Annual Report” for “JVI”. This Annual Report lists “Citronella” as president, secretary and director. Tr. pp. 203-204; Dept. Ex. No. 12. “Citronella”, as “president, secretary and director,” could certainly have authorized a check to the State of Illinois for unpaid taxes.

Although “Citronella” admittedly signed both documents on December 18, 1998, he testified that they were not filled out when he signed them. Tr. p. 204. “Citronella” was asked on direct examination if, when he signed these two documents, he asked “Guest” “what was going on with the paperwork to change over the directors with the Secretary of State’s office?” “Citronella” replied:

Yes, I would ask [“Guest”]—again he would inform me that Mr. Abramson, his attorney, has still not taken care of the paperwork

and that this needs to be signed, because he is not authorized to sign it, because Mr. Abramson did not complete the paperwork. And then he would then tell me that if I did not sign this that the place would close, and that he would not pay my father back the money that was owed to him.
Tr. p. 203.

“Citronella’s” signature on the December 18, 1998, documents and his testimony show conclusively that, seventeen months after his “resignation,” he knew that the “paperwork” had not been completed and that he still held a responsible position with “JVI”. The fact is, on December 18, 1998, “Citronella” could have authorized a check for unpaid Illinois taxes.¹

“Citronella” and “Scallopini” continued to assume responsible positions in “JVI” in years 1999 and 2000. The State of Illinois “Domestic Corporation Annual Report” for 1999 lists “Citronella” as president, secretary, treasurer and director and contains “Citronella’s” signature dated May 8, 1999. This document was admitted without objection from “Citronella’s” counsel. Tr. p. 59; Dept. Ex. No. 11. On May 8, 1999, “Citronella”, as president and treasurer, could have written a check for unpaid Illinois taxes. Department of Revenue “Board of Appeals Petition,” dated October 4, 1999, for “JVI” was admittedly signed by “Citronella”. “Citronella” denies dating the document and testified that he only saw the signature page, but never saw the other six pages. The Petition lists “all corporate shareholders” as John “Citronella” and John “Scallopini”. Tr. pp. 57-59, 216-217, 229-231; Dept. Ex. No. 10.

¹ A “Request for Reinstatement” as a registered retailer for “Mugwump’s” d/b/a/ “JVI” sent to the Department of Revenue contains a signature of “James Citronella” dated September 4, 1998. He denies signing this document. Tr. pp. 54-57, 205-206; Dept. Ex. No. 9. Circuit Court of Cook County case, Edward Don & Company, Plaintiffs v. “Jumanji Ventures, Inc. d/b/a/ “Mugwump’s” Restaurant & “James Citronella”, Defendants, dated October 26, 1999, for breach of written contract, contains an attached credit application with the signature of “James Citronella” as “partner” dated January 8, 1998. “Citronella” denies signing this application. Tr. pp. 66-67, 206-208; Dept. Ex. No. 20.

“JVI’s” “Renewal Application for State of Illinois Liquor License,” also dated October 4, 1999, was admitted without objection. The Application is signed by “Citronella” as “president,” and lists “Scallopini” as “owner.” Question 18 of the form asks “[A]re you delinquent in the payment of any Illinois Business taxes (sales tax, withholding taxes, etc.)?” Written in next to the question is the following: “Have entered into payment plan with Ill. Dept. of Revenue.” Tr. pp. 62-63; Dept. Ex. No. 15. Obviously, on October 4, 1999, “Citronella”, as “president,” admittedly aware of the tax delinquencies, could have written a check for unpaid Illinois taxes. An “Application for State of Illinois Liquor License” issued October 5, 1999 was admittedly signed by “Citronella”, although he denies dating the document “October 4, 1999,” and listing his “title/position” as “president.” Tr. pp. 217-218; Dept. Ex. No. 15. The City of Chicago liquor “License Certificate” for “JVI” dated December 30, 1999 lists “Citronella” as president and secretary. Dept. Ex. No. 28.

Approximately 32 months after their July 10, 1997 “resignations,” “Citronella” and “Scallopini” asked the Chicago Liquor Commission to revoke “Mugwump’s” liquor license. According to “Citronella”’s testimony, they did this because they “found out the amount of money that was owed to the state” and revoking the liquor license “finally put an end to that restaurant.” Tr. p. 211. The transcript of proceedings dated February 22, 2000, entitled “In Re: Proceedings to revoke Retail Liquor License Issued to J.N.J. Ventures, Inc.,” states that the City and the licensee “stipulate to a voluntary revocation of all City licenses.” Counsel for the City asked that the “corporate officers of record of “Jumanji Ventures, Inc.”, ... state that they’re in accordance with the stipulation.” “Scallopini” stated on the records that he was one of the shareholders in

the corporation and “Citronella” stated on the record that he was also one of the shareholders and president of the corporation. Tr. pp. 76, 221-226, 248-250; Dept. Ex. No. 29.

The evidence offered at hearing by the Department shows conclusively and overwhelmingly that “Scallopini” and “Citronella” continued to assume positions of responsibility in the corporation after their “resignations.” Thirty two months after their “resignations,” “Scallopini” and “Citronella”, voluntarily responded in court as “corporate officers of record of “Jumanji Ventures, Inc.” It is troubling, at the least, that “Citronella” and “Scallopini” attempt to rebut the *prima facie* correctness of the assessment in light of the documents admitted at hearing. Either they fraudulently filed documents with government agencies, or they are not truthfully representing their corporate positions and involvement for purposes of this hearing. I conclude that their testimonies here are incredible. Therefore, as corporate officers of record and shareholders, “Scallopini” and “Citronella” had the power and responsibility within J.N.J. to see that the unpaid taxes were remitted to the State of Illinois. Monday, supra. “Scallopini” and “Citronella” have failed to rebut the Department’s *prima facie* case that they were responsible parties of “JVI” during the accrual of the unpaid taxes.

The second and remaining element which must be met in order to impose personal liability is the willful failure to pay the taxes due. The Department presents a *prima facie* case for willfulness with the introduction of the NPL’s and NOD’s into evidence. Branson v. Dept. of Revenue, 168 Ill. 2d 247 (1995). The burden, then, is on the responsible party to rebut the presumption of willfulness.

35 ILCS 735/3-7 fails to define what constitutes a willful failure to pay or file taxes. In attempting to clarify what constitutes a willful failure to file or pay taxes, the courts have adopted a broad interpretation of the words “willfully fails.” Department of Revenue ex rel. People v. Corrosion Systems, Inc., 185 Ill. App. 3d 580 (4th Dist. 1989). Under this broad interpretation, responsible officers are liable if they delegate bookkeeping duties to third parties and fail to inspect corporate records or otherwise fail to keep informed of the status of the retailers’ occupation tax returns and payments. Branson supra. Willfulness also includes “failure to investigate or to correct mismanagement after having notice that withholding taxes have not been remitted to the Government.” Peterson v. United States, 758 F. Supp. 1209 (N.D. Ill. 1990). “Willfulness” as used in the statute may indicate a reckless disregard for obvious or known risks. Monday v. United States, 421 F. 2d 1210 (7th Cir. 1970) *cert. denied* 400 U.S. 821 (1970). Also, a person acts willfully in failing to pay delinquent taxes if he prefers other creditors to the State. Department of Revenue v. Heartland Investments, 106 Ill. 2d 19 (1985).

“Williams’s” conduct was willful under several of the above benchmarks. “Williams” signed twenty-one checks payable to the Illinois Department of Revenue, beginning November 20, 1998 and ending June 21, 1999. Each of these checks were returned from the bank, marked “NSF.” Dept. Ex. Nos. 39 and 40. The first returned check put “Williams” on notice that taxes were not being remitted to the Department of Revenue. He continued to draft and sign twenty more checks payable to the Department, all returned from the bank marked “NSF.” “Williams” testified that when checks were returned from the bank, he would give them to his supervisor. Tr. p. 108. He would then be directed by his supervisor to issue new checks and redeposit them.

According to “Williams”, all checks, whether sent to vendors or the Department of Revenue, were sent at the direction of her supervisors. Tr. p. 109.

I cannot reasonably conclude that “Williams’s” supervisor directed him on at least twenty occasions to sign, issue and deposit new checks payable to the Department of Revenue, as he testified, and that he continued to do so. “Williams’s” activity in continuing to sign check after (returned) check over a seven-month period clearly demonstrates a “reckless disregard” for the obvious risk that taxes were not being paid. Only one signature was required on checks and fund transfers. As a signatory on the bank accounts, “Williams” could have obtained information from the banks with regard to the returned checks. He admitted he had access to various checks and books and he used this access to verify information on the answers to the Request to Admit. Tr. pp. 117-118. At any time after the first check payable to the Department of Revenue was returned from the bank, “Williams” could have unilaterally transferred money into an account to cover the delinquent taxes. There was no testimony or evidence that he tried to do this, indicating a “failure to investigate or correct mismanagement,” when he, in fact, had the power to correct it, after having notice that taxes were not being remitted.

“Williams” also testified that he was instructed by her supervisors to sign checks to vendors. Tr. p. 109. On December 7, 1999 “Williams” signed checks for \$2,581 payable to “Nick Adams”-rent” and for \$377.44 payable to “Nick Adams”(water).” Dept. Ex. No. 38. There is no indication that these checks were returned from the bank. Further, “Williams” testified that as part of “his delegated duties,” he wrote checks to bookkeeping services. Tr. p. 116. Although “Williams” testified that he was “instructed” by his supervisors to sign these checks, the fact is that at any time, he could

have refused to sign. “Williams’s” signature on checks to vendors and his testimony that he signed these checks demonstrates a preference for other creditors over the State of Illinois further showing willfulness on “Williams’s” part.

“Citronella” and “Scallopini” also failed to rebut the Department’s presumption of willfulness. On March 15, 2000, “Scallopini” and “Citronella” filed a “Verified Complaint” against “Christopher Guest” in the Circuit Court of Cook County. “Citronella” admits signing, reviewing and speaking to his attorneys with regard to this verified complaint, which states that ““Guest” established a fiduciary relationship with Plaintiffs “Basilio”, “Scallopini” and “Citronella” in that he became their agent in managing, controlling, selling meals, food, beverages (including alcoholic beverages), to the public, with the duty of accounting for such sales and for the monies defendant “Guest” collected.” Tr. pp. 282-284, 287-288; “Citronella” Ex. No. 12. On July 5, 2000, an “Amended Verified Complaint” was filed in the same case² which states that in the course of negotiating the July 10, 1997 Shareholders Agreement, “Christopher Guest” “told plaintiffs that in order to protect his investment in “Mugwump’s Restaurant”, it was necessary that he manage, run and control the business of “Mugwump’s Restaurant.” Dept. Ex. No. 23. “Scallopini” testified that “[W]e agreed to let Mr. “Guest” take our shares in order that he was going to take care of all bills, whatever was going on.” Tr. p. 241.

In signing numerous substantive documents for “JVI” after their “resignations,” “Scallopini” and “Citronella” demonstrated that they continued to assume positions of responsibility and control within the corporation. They may have delegated the

2.”Citronella” admits signing the verification but he denies that he read the “Amended Verified Complaint” before signing it. Tr. pp. 69-70, 212-213, 226-228.

responsibility of paying bills to “Christopher Guest” either as their “agent,” or in a “fiduciary relationship” as stated in the “Verified Complaint,” or as a way of securing “Guest’s” needed investment of capital in the restaurant, as stated in the “Amended Verified Complaint” and testified to by “Scallopini”. Regardless of “Citronella”’s and “Scallopini”’s reasons, their defense that they are not willful because they delegated and subsequently abdicated responsibility, is not valid. A responsible person cannot escape his obligation to ensure that taxes are paid by delegating responsibility to others. Wright v. United States, 809 F. 2d 425 (7th Cir. 1987). All responsible persons owe a fiduciary obligation to care properly for the funds that are entrusted to them. “A fiduciary cannot absolve himself merely by disregarding his duty and leaving it to someone else to discharge.” Hornsby v. Internal Revenue Service, 588 F. 2d 952 (5th Cir. 1979).

“Carmen Basilio” testified that shareholders meetings continued to be held after July 10, 1997. Sales and bills, including sales taxes, were discussed. Tr. pp. 353-354. At some meetings, “Guest” would report that bills were being paid, although some bills were being paid late. Tr. pp. 354-355. “Citronella” and “Scallopini”, who continued to be shareholders after July 10, 1997, were on notice through these shareholders meetings that bills were not being paid. “Scallopini” testified that the loans he made to the business were never repaid. According to “Scallopini”, “Guest” promised to repay a note to “Scallopini”’s sister at the July 10, 1997 closing, “that never got repaid.” Tr. pp. 239-240. “Citronella” testified that he received “not a penny” from “Mugwump’s” and lost approximately \$200,000. Tr. pp. 208-209. “Citronella” also admitted signing corporate documents in April of 1998 because “Guest’s” attorney had not finalized the paperwork regarding their resignations. Tr. pp. 196, 198.

“Scallopini” and “Citronella” clearly were aware that the restaurant was having difficulties and that the corporation was having trouble paying its debts and repaying investors. A finding of willfulness does not require a showing of actual knowledge of nonpayment of taxes. Reckless disregard for obvious or known risks will suffice to find willfulness under the statute. Branson, *supra*. At every shareholders meeting that bills or payables were discussed or that there was discussion by “Guest” that bills were being paid late, “Citronella” and “Scallopini” disregarded the obvious risk that Illinois taxes were not being paid. They also disregarded the obvious risk that Illinois taxes were not being paid when they waited for, but never received a return from their own investment in the corporation.

There was no testimony or documentary evidence showing any positive steps taken by either “Citronella” or “Scallopini” to pay the late taxes to the State of Illinois. There was no testimony by either “Scallopini” or “Citronella” that they ever inspected the corporate books, which as shareholders and corporate officers, they had the right to do. There was no testimony that they even inquired into the status of the unpaid taxes or tried in any way to correct what was clearly mismanagement. If a responsible person does nothing, despite being in a position to easily discover nonpayment and clearly on notice of a grave risk of nonpayment, a finding of willfulness is justified. Branson, *supra*. Based on the evidence presented, I conclude that “Scallopini” and “Citronella” have failed to rebut the Department’s presumption that they willfully failed to pay the sales and withholding taxes.

WHEREFORE, for the reasons stated above, it is my recommendation that Notices of Penalty Liability and Notices of Deficiency issued against “Patrick

Williams”, “James Citronella” and “Johann Scallopini”, respectively, be finalized as issued.

March 3, 2003

Kenneth J. Galvin
Administrative Law Judge